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Adarand Constructors, Inc. v. PENA: The Armageddon of Affirmative Action

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ADARAND CONSTRUCTORS, INC. V. PENA: THE ARMAGEDDON OF AFFIRMATIVE ACTION

INTRODUCTION

The battle over affirmative action is currently raging in both the legal and political arenas. The United States Supreme Court attempted to resolve this conflict with its decision in *Adarand Constructors, Inc. v. Pena*.[1] In *Adarand*, the Court determined that strict scrutiny[2] is the appropriate standard of review for federally created affirmative action programs.[3] This decision, taken together with the Court's decision in *City of Richmond v. J.A. Croson Co.*[4] renders any race-based legislation, instituted by either the federal or local government, subject to the most searching judicial inquiry. Although traditional constitutional jurisprudence illustrates that legislation rarely passes strict scrutiny,[5] the Court left that determination to the lower court on remand.[6] Thus, questions remain as to the ramifications of the decision in *Adarand*: by imposing strict scrutiny has the Court delivered the final, deadly blow to affirmative action? Or, does affirmative action still have some life?

This Note focuses on three issues which are prevalent in the affirmative action battle and which have played an important role in the Court's decision in *Adarand*: (1) the practicality of standards of review and the application of strict scrutiny in the equal protection context; (2) the role of the Supreme Court in the political arena with regard to the appropriate amount of deference to be given to Congress; and (3) the doctrine of stare decisis and its future after *Adarand*.

In addressing these issues, Part I of this Note begins by providing the reader with a historical overview of the Supreme Court's affirma-

1. 115 S. Ct. 2097 (1995).

2. *See infra* notes 61-68 and accompanying text (defining strict scrutiny as requiring the government to prove that it has a compelling state interest in enacting the legislation, and that the means by which this interest is achieved are narrowly tailored).

3. 115 S. Ct. at 2117.

4. 488 U.S. 469 (1989); *see infra* notes 39-43 and accompanying text (discussing the Court's decision in *Croson* to apply strict scrutiny to a race-based affirmative action program instituted by a municipality).

5. *See infra* notes 61-71 and accompanying text (discussing the application of strict scrutiny and its practical effects).

6. *Adarand*, 115 S. Ct. at 2118.

tive action jurisprudence in order to highlight the indeterminate nature of the Court's decisions in this area. Part I then discusses the foundational underpinnings of standards of review, the development of the relationship between Congress and the Court, and the doctrine of stare decisis.

In light of this background, Part II briefly reviews the lower court's opinion in *Adarand*, then focuses on the arguments articulated by the Supreme Court Justices. Part III analyzes and critiques the arguments of the Justices with respect to the three issues presented. This section of the Note also provides alternatives to the Court's decision and evaluates the feasibility of these alternatives. Finally, Part IV examines the practical impact of the *Adarand* decision and its influence on the lower courts.

The author ultimately concludes that *Adarand* was incorrectly decided. The application of strict scrutiny to federally enacted affirmative action programs demonstrates a blatant disregard of the present effects of racial discrimination, the ability of Congress to remedy this discrimination, and past judicial precedent. This decision will result in the unnecessary demise of beneficial affirmative action programs. The author proposes that the inherent problems of this decision could have been eliminated by the application of intermediate scrutiny to affirmative action programs.

I. BACKGROUND

A. *The Roots of Affirmative Action*

The foundation of affirmative action lies in the language of the Fourteenth Amendment which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[7] Known as the Equal Protection Clause, this language serves a dual function. Not only does it protect individuals from discrimination,[8] it also allows the government to institute affirmative remedial measures to combat discrimination.[9] This duality, however, results in a dichot-

7. U.S. CONST. amend. XIV, § 1, cl. 2. This same requirement is imposed on the federal government through the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (prohibiting the federal government from segregating public schools on the basis of race under the Due Process Clause of the Fifth Amendment).

8. *See* Loving v. Virginia, 388 U.S. 1 (1967) (striking down a statute which prohibited interracial marriages as violative of the Equal Protection Clause); Strauder v. West Virginia, 100 U.S. 303 (1880) (utilizing the Equal Protection Clause to strike down a statute which allowed only Caucasian persons to serve on juries).

9. U.S. CONST. amend. XIV, § 5; *see, e.g.*, Swann v. Charolette Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (mandating the desegregation of schools through specific remedial measures); Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955) (providing school authorities with a

omy. Remedial, affirmative action measures come into direct conflict with the concept of colorblindness expressed by Justice Harlan almost one hundred years ago in *Plessy v. Ferguson*.[10] Justice Harlan stated: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[11] As this Note demonstrates, the consequences of this dichotomy are evident throughout affirmative action jurisprudence.[12]

The practice of government, federal or local, taking affirmative measures to remedy the effects of past discrimination was firmly established by the school desegregation cases.[13] In *Brown v. Board of Education (Brown II)*,[14] the United States Supreme Court recognized that race-conscious remedies were necessary to eliminate segregation.[15] Remedial measures, however, did not remain confined to the arena of school desegregation. From the idea of equality of opportunity, inherent in the desegregation cases, the Court logically progressed to the acceptance of the goal of equality of result in affirmative action.[16] The doctrine of "benign"[17] remedial measures was ex-

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time-table for desegregating their schools); *see generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (arguing that the simultaneous enactment of the Freedmen Bureau Act and the Fourteenth Amendment demonstrate that Congress intended race-conscious remedies to be permissible under the Fourteenth Amendment).

10. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

11. *Id.*

12. *See infra* notes 19-38 and accompanying text (demonstrating instances where the Court had difficulty resolving affirmative action cases).

13. *See* Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526 (1979) (requiring that the school board institute effective remedies to decrease segregation); Swann v. Charolette Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding the use of race-conscious remedies to eliminate segregation in schools); Brown v. Board of Educ. (Brown II), 349 U.S. 294, 300 (1955) (instructing lower courts to implement desegregation "with all deliberate speed").

14. 349 U.S. 294 (1955).

15. *See infra* note 103 and accompanying text (discussing the Court's rationale in *Plessy v. Ferguson*, and its subsequent abandonment of the doctrine of "separate but equal" in *Brown*).

16. *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 163-65 (1991) (asserting that there is a logical progression from desegregation to affirmative action due to an underlying desire to assure equality of opportunity); *see also* Michel Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1778-86 (1989) (stating that equality of result, or affirmative action, is the extra step required when equality of opportunity has been denied for a prolonged period).

17. On the simplest level, a "benign" racial classification can be defined as a "good intention," while an invidious racial classification is defined as a "bad" one. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2121 (1995) (Stevens, J., dissenting). In *Adarand*, Justice Stevens criticized the majority's view that "benign" and "invidious" discrimination cannot be easily differentiated. *Id.* Justice Stevens stated:

> [The Court's application of strict scrutiny] would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off

tended to school admissions as well as employment and also resulted in the creation of minority set-aside programs.[18] As the scope of the doctrine of affirmative action expanded, however, the remedial/color-blind dichotomy presented the Court with considerable difficulty in adjudicating these issues.[19]

The case of *Regents of the University of California v. Bakke*[20] was the first time the Court articulated its views on affirmative action.[21] In *Bakke*, a medical school applicant raised an equal protection challenge to the admissions program at the University of California at Davis, which reserved spaces in the incoming class for minority students.[22] While no majority opinion was reached,[23] in his plurality opinion, Justice Powell rejected the argument that "discrimination against [the] members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'"[24] Thus, Justice Powell called for the most exacting judicial examination. [25] Although Justice Powell agreed with the dissenting Justices that the goal of diversity

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> the Supreme Court as on par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. . . ."

Id.; *see also infra* notes 160-64 and accompanying text (discussing Justice Stevens' critique of the majority's consistency theory).

In contrast, Justice Thomas espoused the view that "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Adarand*, 115 S. Ct. at 2119-20 n* (Thomas, J., concurring) (citations omitted).

18. *See* Small Business Act, 15 U.S.C. §§ 631-651 (1994) (providing that socially and economically disadvantaged individuals have the opportunity to participate in the performance of federal contracts).

19. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding, in a five-to-four decision, that racially preferential layoffs for public school teachers were unconstitutional); Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding the constitutionality of a federal minority set-aside program for public works projects in a six-to-three decision, but unable to reach a majority opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (deciding that a preferential treatment program in university admissions was invalid, but four of the Justices believed the program was only invalid on statutory grounds).

20. 438 U.S. 265 (1978).

21. *But cf.* DeFunis v. Odegaard, 416 U.S. 312 (1974) (refusing to address the issue of the constitutionality of affirmative action in a school admissions case since the issue had become moot).

22. 438 U.S. at 272-75.

23. Chief Justice Rehnquist and Justices Stevens, Burger, and Stewart argued that the legality of the affirmative action program was not at issue; rather, the program should be held invalid under Title VI of the Civil Rights Act of 1964. *Id.* (Stevens, J., concurring in part and dissenting in part).

24. *Id.* at 294; *see infra* note 64 (defining suspect class).

25. *Bakke*, 438 U.S. at 297-320.

may be a sufficiently compelling interest,[26] he found "the use of a quota system unconstitutional."[27] In contrast, the dissenting Justices rejected the notion that colorblindness should bar remedial measures.[28] Rather, they would have upheld the program after applying intermediate scrutiny.[29] The Court's inability to reach a consensus in *Bakke* is characteristic of its disjointed treatment of affirmative action.[30]

Shortly after *Bakke*, the Court was faced with a challenge to the constitutionality of a program which set aside government funding for minorities. In *Fullilove v. Klutznick*,[31] the Court, in a six-to-three decision, upheld a federal provision which required that ten percent of the federal funds that were allocated for local public works projects be used to procure services from Minority Business Enterprises (MBEs).[32] Instead of imposing a designated standard of review, the Court applied a two-step test to reach this result. First, it asked whether the "*objectives* of this legislation are within the power of Congress."[33] Second, it asked "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment."[34] The Court held that this legislation was within the spending power of

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26. Justice Powell explained that attainment of a diverse student body is a compelling interest because it promotes academic freedom, which is a special concern of the First Amendment. *Id.* at 311-12. Academic freedom, according to Justice Powell, allows the university to select its own student body. *Id.*

27. *Id.* at 315-19. Justice Powell described the special admissions program at issue: "[there were] 16 special admissions seats [reserved for minority applicants], white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants." *Id.* at 289. Justice Powell found that a system such as this was unconstitutional since it "focused *solely* on ethnic diversity." *Id.* at 315. Rather, a system such as the one instituted at Harvard College was preferable. *Id.* at 316-17. Under the Harvard admissions program, race or ethnic background was considered a "plus," but the applicant would still be compared to "all other candidates for the available seats." *Id.*

28. *Id.* at 327. Justice Brennan stated that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." *Id.*

29. *Id.* at 357-62.

30. *See supra* note 19 (noting other cases where the Court had difficulty adjudicating in the area of affirmative action).

31. 448 U.S. 448 (1980).

32. *Id.* at 453-54. An MBE was described as "a business at least 50 per centum of which is owned by minority group members . . . . [M]inority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.* at 454 (quoting Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116.)

33. *Id.* at 473.

34. *Id.*

Congress.[35] The Court also rejected the contention that Congress, in invoking this power, "must act in a wholly 'color-blind' fashion" and, thus, found Congress' actions constitutional.[36] The concurring Justices, who had dissented in *Bakke*, reiterated the fact that intermediate scrutiny is the proper constitutional standard for dealing with racial classifications that confer benefits on minorities.[37]

After *Fullilove*, the Court remained sharply fragmented in its affirmative action decisions and, consequently, was unable to reach a majority with respect to the standard to be applied.[38] It was not until *City of Richmond v. J.A. Croson Co.*[39] that the Court finally reached a consensus. There, a majority of the Court, in a five-to-four decision, firmly concluded that any race-based affirmative action program enacted by a municipality must be subject to strict scrutiny.[40] The Court maintained that the affirmative action plan in question was not justified by a compelling governmental interest because there was no precise evidence of prior discrimination.[41] In addition, the thirty-percent set-aside was not sufficiently narrowly tailored to accomplish a remedial purpose.[42] The dissent, composed of the same core of Justices,

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35. *Id.* at 475. The Spending Power is the power to "provide for . . . general welfare of the United States." U.S. CONST. art. 1, § 8, cl. 1. The Court noted that "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove*, 448 U.S. at 474. The MBE provision at issue was structured in this way, and the Court mentioned that it had upheld the use of this technique in the past. *Id.*

36. *Fullilove*, 448 U.S. at 482. In order to support this proposition, the Court relied on *Swann v. Charolette Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-21 (1971), which allowed race to be considered in formulating a remedy for school desegregation. *Id.*

37. *Id.* at 519 (Marshall, J., concurring).

38. *See* Rosenfeld, *supra* note 16, at 1729-31 (discussing the divisiveness of the Court in the area of affirmative action which existed until *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), where the Court finally agreed on a standard of review); *see, e.g.*, United States v. Paradise, 480 U.S. 149 (1987) (upholding, in a five-to-four decision, the use of numerical promotion preferences for state troopers); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (upholding, in a five-to-four decision, the use of numerical hiring goals); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion) (striking down a race-conscious preferential layoff program, in a five-to-four decision, although no majority opinion was reached as to the appropriate standard of review).

39. 488 U.S. 469 (1989).

40. *Id.* at 493-94.

41. *Id.* at 509-10. In order for the city's interest in remedying discrimination in the awarding of public construction contracts to be "compelling," the Court maintained that the city would have needed to prove that "qualified minority contractors [had] been passed over for city contracts or subcontracts, either as a group or in any individual case." *Id.* The city would also have needed to present evidence as to "how many minority enterprises are present in the local construction market [and their level of participation]." *Id.* This language demonstrated the Court's search for statistical proof.

42. *Id.* at 507. In analyzing the "narrowly tailored" prong of strict scrutiny, the Court asserted that the city could have used race-neutral alternatives to increase minority participation in con-

including Justices Brennan, Marshall, and Blackmun, again criticized the use of strict scrutiny for race-conscious remedial measures.[43]

The scope of the holding in *Croson*, however, was limited one year later in *Metro Broadcasting, Inc. v. FCC*.[44] The Court in *Metro Broadcasting* invoked intermediate scrutiny[45] and held that using race as a factor for broadcast license applications did not violate the Equal Protection Clause.[46] Broadcast diversity, according to the Court, was an important governmental objective[47] and therefore met the relevant test.[48] What distinguished this case from *Croson* was that Congress, not the municipality, had enacted the remedial measure.[49] A four-Justice dissent[50] maintained that, under *Croson*, the appropriate standard of review should have been strict scrutiny, regardless of which

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tracting. *Id.* at 509. The Court offered that instead of race-conscious quotas, the city could have provided financing for small firms generally and, thus, could have achieved the same result of greater minority participation. *Id.* at 510. In addition, the Court stated that to pass strict scrutiny, the scheme would have needed to allow for a waiver of the set-aside provision as seen in *Fullilove*. *Id.* at 508. If there was no evidence that the MBE had been affected by past discriminatory action, then the set-aside provision would not be applicable. *Id.* at 507-08.

43. *Id.* at 553. Justices Brennan, Marshall, and Blackmun are the same Justices who had adhered to the application of intermediate scrutiny in *Bakke* and *Fullilove*. In *Bakke*, this group argued: "because of the significant risk that racial classifications established for ostensibly benign purposes can be misused. . . . an important and articulated purpose for its use must be shown." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (1978) (Marshall, J., dissenting). This core then became part of the majority in *Fullilove*, which upheld a federally enacted affirmative action program on the basis that Congress was given the authority to enact these programs. *See supra* notes 31-37 and accompanying text (discussing the *Fullilove* decision, which upheld the federal enactment of a minority set-aside program).

44. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

45. *See infra* notes 72-82 and accompanying text (describing the evolution of the intermediate scrutiny test and its requirement of an important government objective and substantially related means).

46. 497 U.S. at 600. The case involved a challenge to two policies of the Federal Communications Commission: "(1) a program awarding enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority 'distress sale' program, which permitted a limited number of existing radio and television broadcast stations to be transferred only to minority-controlled firms." *Id.* at 552.

47. The Court analogized broadcast diversity to diversity of a student body as seen in *Bakke*: "Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, . . . the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568 (citations omitted); *see supra* note 26 and accompanying text (discussing the compelling state interest of student body diversity in the context of the *Bakke* case).

48. *Metro Broadcasting*, 497 U.S. at 567-68.

49. *Id.* at 565; *see infra* notes 89-92 and accompanying text (discussing the Court's traditional deference to Congress in the affirmative action context).

50. *Metro Broadcasting*, 497 U.S. at 602. The composition of the dissent—Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia—is crucial to note at this point. With the addition of Justice Thomas, the dissent in *Metro Broadcasting* became the majority in *Adarand*. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

legislative body created the program.[51] *Metro Broadcasting* was the Court's final word on affirmative action prior to its *Adarand* decision.

B. *The Evolution of Standards of Review*

As the above case history demonstrates, one source of the Court's divisiveness in the area of affirmative action is disagreement over the correct standard of review. As a framework for analysis under the Equal Protection Clause, the Court has developed a three-tiered approach which includes rational basis review,[52] intermediate scrutiny,[53] and strict scrutiny.[54]

Initially, the Supreme Court reviewed equal protection cases under the rational basis standard.[55] This standard of review grants a large amount of deference to the ability of the legislature to formulate social policies which relate to legitimate goals.[56] In applying this test, the Court asks whether a classification has a "rational relationship to any legitimate government interest."[57]

The development of the strict scrutiny standard of review for racial classifications began in a footnote in *United States v. Carolene Products Co.*[58] There, Justice Stone recognized that a more exacting judicial examination was necessary if legislation prejudiced "discrete and

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51. *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting). The dissent, written by Justice O'Connor, maintained that had strict scrutiny been invoked, as it properly should have been, the legislation at issue would not have survived. *Id.* Justice O'Connor stated: "[t]he interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Id.* Justice O'Connor also asserted that the narrowly tailored prong of the test was not satisfied. *Id.* at 621. The policy was overinclusive in that some members of the racial group had no interest in advancing the views which the FCC believed were underrepresented. *Id.* The policy was also underinclusive in that those that did have an interest in presenting their views were not given a preference. *Id.* Moreover, race-neutral means were available to remedy the situation. *Id.* at 622. For example, the FCC could have required its "licensees to provide programming that the FCC believe[d] would add to diversity." *Id.*

52. *See infra* notes 55-57 and accompanying text (discussing rational basis review and its application).

53. *See infra* notes 72-82 and accompanying text (discussing the standard of intermediate scrutiny and its application).

54. *See infra* notes 61-71 and accompanying text (describing the standard of strict scrutiny and its application).

55. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 387 (5th ed., West 1995).

56. *Id.* at 600.

57. *Id.* at 606. For a more thorough discussion of the rational basis test, including case law which demonstrates the courts' application of this test, see *id.* at 606-20.

58. 304 U.S. 144, 152-53 n.4 (1938). In footnote number four, the Court indicated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*

insular" minorities.[59] This was due to the fact that this type of legislation might "curtail the operation of those political processes [which] ordinarily [were] relied upon to protect minorities."[60]

Even though the Court in *Carolene Products* recognized that two separate modes of analysis were necessary, the birth of strict scrutiny did not occur until *Korematsu v. United States*.[61] In *Korematsu*, the Court held for the first time that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[62] In order for the standard of strict scrutiny to apply under the Equal Protection Clause, the legislation at issue must have been enacted with a discriminatory purpose[63] against a suspect class.[64] If this prerequisite is met, the government is faced with the burden of proving that it had a "compelling" state interest for enacting the legislation and that the means by which it sought to achieve that interest were "narrowly tailored" to effectuate its goal.[65] Despite the application of strict scrutiny in *Korematsu*, the Court upheld as constitutional a military order which excluded persons of Japanese descent from certain areas.[66] The Court rationalized that the government had a compelling state interest in maintaining safety in times of war.[67]

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59. *Id.*

60. *Id.*

61. 323 U.S. 214 (1944); *see* John Galotto, Note, *Strict Scrutiny for Gender, Via* Croson, 93 COLUM. L. REV. 508, 514 (1993) (tracing the birth of strict scrutiny from *Korematsu*).

62. *Korematsu*, 323 U.S. at 216.

63. *See* Washington v. Davis, 426 U.S. 229 (1976) (holding that there was a disproportionate racial impact where African-Americans failed an admissions test for the police force four times as frequently as Caucasians, but this by itself was not enough to demonstrate a discriminatory purpose necessary to trigger strict scrutiny).

64. An interesting and definitive comment on the idea of suspect class in the affirmative action context is found in Justice Brennan's opinion in *Regents of the Univ. of Cal. v. Bakke*:

> Unquestionably, we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. . . . But no fundamental right is involved here. . . . Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

438 U.S. 265, 357 (1978) (Brennan, J., concurring in part and dissenting in part) (citations omitted).

65. *See supra* note 42 and accompanying text (discussing what the Court may require in order to meet the "narrowly tailored" prong of strict scrutiny).

66. 323 U.S. at 219.

67. *Id.* at 223. The Court mentioned that the case hinged upon the fact that the United States was at war with Japan. *Id.* If Korematsu had been imprisoned solely because of racial prejudice then the outcome would have been different. *Id.*

Although the legislation in the *Korematsu* case survived, even today a governmental interest is rarely compelling enough to pass strict scrutiny. This rarity provoked Professor Gerald Gunther to coin the phrase that strict scrutiny means "'strict' in theory and fatal in fact."[68] Gunther compared this to the rational basis standard of review, which to him meant "minimal scrutiny in theory and virtually none in fact."[69] In other words, with strict and minimal scrutiny as the only standards of review, the results of equal protection cases were largely a knee-jerk reaction.[70] Legislation under the two-tiered approach was either automatically upheld or automatically invalidated.[71] The problem for the Court then became how to determine which characteristics warranted the application of the strict scrutiny, as opposed to the rational basis standard.

In the areas of gender, illegitimate children, and aliens, which hold some of the characteristics of a suspect class, the Court recognized that neither strict scrutiny nor the rational basis test would allow the Court to achieve its desired result.[72] Thus, the Court introduced intermediate scrutiny as a third, middle tier in the framework. In *Craig v. Boren*,[73] a gender discrimination case, the Court held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[74]

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68. Gerald Gunther, *The Supreme Court 1971 Term, Foreward: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

69. *Id.*

70. It can be argued that strict scrutiny and rational basis review invoke an almost involuntary reaction. For strict scrutiny, this is demonstrated by the fact that since the 1944 *Korematsu* case, no affirmative action legislation has passed strict scrutiny. *But see* United States v. Paradise, 480 U.S. 149 (1987) (upholding a court order which mandated the use of numerical promotion preferences for state troopers under the strict scrutiny standard). On the other hand, for an example of the extremely deferential nature of the rational basis test, see *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). *Williamson* upheld a statute which prevented opticians from duplicating or replacing frame lenses without a prescription from an opthamologist or optometrist under the Due Process Clause of the Fourteenth Amendment, using the rational basis test. *Id.*

71. *See* Galotto, *supra* note 61, at 517-18 (arguing that the strict scrutiny and minimal rationality tests operated as per se rules which came pre-packed with specific results).

72. *See* Jeffery M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163 (1984). "Intermediate scrutiny allows the Court to take a neutral stance that favors neither the government nor the party challenging it." *Id.*

73. 429 U.S. 190 (1976).

74. *Id.* at 197. The Court recently utilized intermediate scrutiny to hold that the exclusion of women from a Virginia military college violated the Equal Protection Clause. United States v. Virginia, 116 S. Ct. 2264 (1996). The Court stated that Virginia did not show the necessary "exceedingly persuasive justification for excluding women." *Id.* at 2276. Further, the Court explained: "the justification must be genuine, not hypothesized or invented post hoc in response to litigation. And, it must not rely on overbroad generalizations about the different talent, capacities, or preferences of males and females." *Id.* at 2275.

Although more lenient than the strict scrutiny standard, intermediate scrutiny does have some force. For example, in *Craig v. Boren*, the Court applied this mid-level scrutiny to strike down legislation that forbade males under the age of twenty-one from buying non-intoxicating beer,[75] while permitting the sale to females over the age of eighteen.[76] The Court found that the government's goal of traffic safety was sufficient to meet the "important objective" prong of the test.[77] However, the means and the ends did not fit.[78] The Court found that the link between gender and traffic safety was tenuous because the statute prohibited only the selling of a certain type of beer to young men; it did not prohibit them from drinking the beer once they acquired it.[79]

On the other hand, intermediate scrutiny is by no means an insurmountable burden. In *Michael M. v. Superior Court*,[80] the Court upheld a statute which made men, but not women, liable for sexual intercourse with a partner under the age of eighteen. The Court held that preventing illegitimate teenage pregnancy was an important governmental objective and that the statute equalized the deterrents on both sexes.[81] Therefore, there was a substantial relation between the ends and the means.[82]

In the area of affirmative action, the Court has had difficulty in determining whether the strict scrutiny or intermediate scrutiny standard is applicable. For instance, in *Croson*, the Court held that strict scrutiny was appropriate due to the fact that the legislation at issue was based on race, a suspect class.[83] In contrast, the dissent in *Croson* and the majority in *Metro Broadcasting* asserted that affirmative action, a benign classification, fits more comfortably under intermediate scrutiny.[84] As will be seen, the *Adarand* case provides a resolution to this debate.

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75. The percentage of alcohol in the prohibited beer was 3.2 percent. *Craig*, 429 U.S. at 192.

76. *Id.*

77. *Id.* at 199.

78. *Id.* at 200-04.

79. *Id.* at 204.

80. 450 U.S. 464 (1981).

81. *Id.* at 473.

82. *Id.*

83. 488 U.S. 469, 493 (1989).

84. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 535 (1989) (Marshall, J., dissenting).

C. *The Troubled Marriage of the Court and Congress*

As discussed above, the Court's divisiveness in the affirmative action context can be attributed to disagreement over the correct standard of review. However, this is not the only factor which aggrieves the Court. Debate over the appropriate relationship between the Court and Congress has also contributed to the Court's fragmentation.

The common law has established that the Equal Protection Clause of the Fourteenth Amendment applies to the federal government through the Due Process Clause of the Fifth Amendment.[85] The Court stated in *Bolling v. Sharpe*[86] that the federal government has the same obligation as the state to avoid racial classifications because "it would be unthinkable . . . [to] impose a lesser duty on the Federal Government."[87] Even though the Court has mandated that Congress adhere to the Equal Protection Clause by not discriminating, it has also recognized that the Constitution grants Congress the authority to enact remedial measures to enforce it, as seen in the affirmative action context.[88]

In *Fullilove*, the Court articulated its view on the appropriate relationship between Congress and the Court in matters of affirmative action.[89] There, Justice Burger asserted that "Congress, not the Courts, has the heavy burden of dealing with a host of intractable economic and social problems."[90] Thus, the Court imposed a less-stringent standard of review on the federally enacted minority set-aside program, under the theory that "Congress has the necessary latitude to try new techniques, such as the limited use of racial and ethnic criteria to accomplish remedial objectives."[91] This view was further affirmed by the Court in *Metro Broadcasting*, where it held that the appropriate standard of review for federal legislation was intermediate scrutiny.[92] The *Adarand* decision represents a departure from this notion of judicial deference to Congress. In *Adarand*, the Court, for the first time,

85. U.S. CONST. amend. V; *see* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (commenting that the Court's approach to equal protection claims is the same under the Fifth Amendment as it is under the Fourteenth Amendment).

86. 347 U.S. 497 (1954).

87. *Id.* at 500.

88. U.S. CONST. amend. V; *see supra* note 9 (discussing the origin of congressional authority to enact remedial measures).

89. 448 U.S. 448 (1980).

90. *Id.* at 486.

91. *Id.* at 490.

92. 497 U.S. 547, 564 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

applied strict scrutiny to a federally enacted affirmative action program.[93]

D. The Perils and Prominence of Precedent

The Court's obligation to abide by, or adhere to, its formerly decided cases[94] is the final factor which has plagued the Court in its affirmative action jurisprudence. Although the Court rarely mentions the doctrine of stare decisis explicitly in its decisions, it is of fundamental importance.[95]

A prime example of stare decisis at work is seen in the abortion context. In *Planned Parenthood v. Casey*,[96] the Court refused to overrule the doctrine established in *Roe v. Wade*.[97] Justice O'Connor stated that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[98] Justice O'Connor maintained, however, that stare decisis was not an "inexorable command"; she stated that precedent may be overruled if "the rule has proven to be intolerable simply in defying practical workability"[99] or if the law has changed such that the old rule is "no more than a remnant of abandoned doctrine."[100] Nevertheless, Justice O'Connor determined that *Casey* was the inappropriate vehicle for overruling *Roe*, due to the fact that those who had relied on *Roe* might suffer inequity if it were overruled.[101]

Whereas *Casey* exemplifies the importance of upholding precedent, *Brown v. Board of Education*[102] presents a strong argument for abandoning it. The desegregation of schools mandated by *Brown* never

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93. *Adarand*, 115 S. Ct. 2097.

94. Stare decisis has been defined as:

> Policy of the courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same; regardless of whether the parties and property are the same.

BLACK'S LAW DICTIONARY 1406 (6th ed. 1990) (citations omitted).

95. *See* James C. Rehnquist, Note, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986) (arguing that stare decisis is virtuous in that it promotes "fairness, stability, predictability and efficiency" in the law, and also ensures that "similarly situated individuals are subject to the same legal consequences").

96. 505 U.S. 833 (1992).

97. 410 U.S. 113 (1973).

98. *Casey*, 505 U.S. at 854.

99. *Id.*

100. *Id.* at 855.

101. *Id.* at 856.

102. 347 U.S. 483 (1954).

would have occurred if the Court was bound to the "separate but equal" principle of *Plessy v. Ferguson*.[103] In other words, a disadvantage of strict adherence to the doctrine of stare decisis is that it may shield prior judicial errors from subsequent correction.[104]

Despite the force of the arguments for and against stare decisis, the application of the doctrine depends largely on the views of the individual Justices.[105] Consequently, the doctrine remains "indeterminate" and "malleable," depending on the subjective views of the individual Justices.[106] As will be explained, the doctrine of stare decisis played an important role in the *Adarand* decision.[107]

II. SUBJECT OPINION: *ADARAND CONSTRUCTORS, INC. V. PENA*

A. *Facts and Procedure*

Adarand Constructors, Inc., a Colorado-based highway construction company run by a Caucasian male, brought suit against the United States Department of Transportation under the equal protec-

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103. 163 U.S. 537 (1896). In *Plessy*, the plaintiff, who was seven-eighths Caucasian and one-eighth African, was convicted for violating a Louisiana state law which designated "separate railway carriages for the white and colored races." *Id.* at 540. The Court held that this practice was not violative of either the Thirteenth Amendment or the Fourteenth Amendment. *Id.* at 552. The Court reasoned that the government has an obligation to provide "equal rights before the law and equal opportunities." *Id.* at 551. This obligation was satisfied by providing equal access to the train system. *Id.* The government, however, could not force the races to commingle. *Id.* The Court stated:

> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

Id. at 551-52. This notion was subsequently abolished by the Court in *Brown*, where the Court held that "separate educational facilities [we]re inherently *unequal*" and deprived persons "of the equal protection of the laws guaranteed by the Fourteenth Amendment." 347 U.S. 483, 495 (1954) (emphasis added). The Court held that there are certain intangible factors which prevent a child in a segregated school from receiving equal educational opportunities. *Id.* at 493-94.

104. Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1693 (1994).

105. *See* David K. Koehler, *Justice Souter's "Keep-What-You-Want-and-Throw-Away-the-Rest" Interpretation of Stare Decisis*, 42 BUFF. L. REV. 859, 892 (1994) (arguing that Justice Souter has "defam[ed] the doctrine of stare decisis" by picking and choosing which precedents to follow). This article also discusses Justice Marshall's dissent in *Payne v. Tennessee*, 501 U.S. 808, 844 (1991), which asserted his view that the Court owes more to its constitutional precedents. *Id.* at 891.

106. *Id.* at 891 n.193.

107. *See infra* notes 137-43 and accompanying text (discussing the Court's abandonment of the doctrine of stare decisis in the *Adarand* case).

tion component of the Fifth Amendment's Due Process Clause.[108] Despite the fact that it submitted the low bid on a guardrail project, Adarand was passed up for the job, due to the federal government's incentives to general contractors for hiring "socially and economically disadvantaged" subcontractors.[109] According to federal regulations, the Small Business Act (SBA) presumes a subcontractor is "socially disadvantaged" if he or she is Black, Hispanic, Asian Pacific, Subcontinent Asian, or Native American.[110] Adarand challenged this presumption as discrimination on the basis of race.[111] Adarand sought declaratory and injunctive relief against the use of this subcontractor compensation clause.[112]

Adarand filed suit in the U.S. District Court for the District of Colorado, which granted summary judgment in favor of the government.[113] Adarand then appealed to the U.S. Court of Appeals for the Tenth Circuit.[114] The Tenth Circuit reviewed the Supreme Court's prior affirmative action decisions and determined that intermediate scrutiny was the appropriate standard of review.[115] The court reasoned that because the program at issue was enacted by Congress, a more lenient standard of review was required under *Fullilove*.[116] The Tenth Circuit interpreted *Croson* as holding that strict scrutiny is only

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108. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2101 (1995); *see infra* note 130 (discussing the equal protection component of the Fifth Amendment's Due Process Clause).

109. *Adarand*, 115 S. Ct. at 2101. Adarand knew that the federal incentive program was the reason that it was passed up for the guardrail project. *Id.* at 2102. The general contractor, Mountain Gravel & Construction Company, submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring the minority firm instead. *Id.*

110. *Id.* at 2103 (citing 13 C.F.R. § 124.105(b)(1) (1995)).

111. *Id.* at 2102. The Court highlighted several pertinent sections of the SBA, 15 U.S.C. §§ 631-651 (1994):

> The Small Business Act . . . declares it to be "the declared policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." . . . The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group, without regard to their individual qualities." . . . The SBA presumes that Black, Hispanic, Asian Pacific, Subcontinent Asia, and Native Americans are socially disadvantaged. Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage."

Id. at 2102-03 (citations omitted).

112. *Id.* at 2104.

113. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (1992).

114. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994).

115. *Id.* at 1543-44.

116. *Id.* at 1544.

applicable when the affirmative action program is enacted by the state or municipality.[117] Thus, the court applied intermediate scrutiny and found that under the SBA, the government had an important interest in helping disadvantaged businesses obtain subcontracts.[118] Further, the program at issue was narrowly tailored to achieve this goal.[119] The Supreme Court granted certiorari to determine the appropriate standard of review.[120]

B. *The Majority Opinion*

In a five-to-four decision,[121] the Supreme Court decided that for federally enacted affirmative action programs, as well as state and local ones, strict scrutiny was the appropriate standard of review.[122] The Court then remanded the case to the lower court for further analysis.[123] Composing the majority in this case were Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas.[124] Justice O'Connor wrote the Court's opinion.

After determining that Adarand had standing,[125] the Court reviewed its affirmative action decisions prior to *Adarand*, with the exception of *Metro Broadcasting*.[126] The Court stated that three general principles had been established in its jurisprudence regarding governmental racial classifications: "skepticism," "consistency," and "congruence."[127]

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117. *Id.*

118. *Id.* at 1547.

119. *Id.* The court presented further support for the constitutionality of the federal program: "the program is not limited to members of racial minority groups," the provision is subject to regular reevaluation by Congress therefore it is "limited in extent and duration," and the provision allows the general contractor to decide whether or not to award the contract to a minority business. *Id.*

120. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2101-02 (1995).

121. This is one of many closely decided affirmative action cases. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (upholding as constitutional a federally enacted affirmative action program which allowed for the use of race as a factor in the application for a broadcast license, in a five-to-four decision), *overruled by Adarand*, 115 S. Ct. 2097; Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding unconstitutional, in a five-to-four decision, a racially preferential layoff plan).

122. *Adarand*, 115 S. Ct. at 2117.

123. *Id.* at 2118.

124. *Id.* at 2101.

125. Justice O'Connor began by recognizing that Adarand had standing to bring the suit since Adarand was likely to bid on a guardrail contract which contained a subcontractor compensation clause in the relatively near future. *Id.* at 2104-05.

126. *Adarand*, 115 S. Ct. at 2106-13; *see* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), *overruled by Adarand*, 115 S. Ct. 2097.

127. *Adarand*, 115 S. Ct. at 2111. Justice O'Connor utilized these three propositions as an attempt to reconcile the inconsistent decisions of the past by finding a basis of agreement. *Id.*

In terms of skepticism, the Court cited several of its previous decisions to support the proposition that the Court has traditionally been suspicious of any classification based on racial or ethnic criteria.[128] In addition, the Court asserted that it had previously been consistent in its application of strict scrutiny to affirmative action cases.[129] Finally, the Court observed that there was congruence between the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment's Due Process Clause in that the analysis under both is the same.[130] The Court combined these three ideas to reach the conclusion that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[131]

The Court was faced with one predominant barrier in justifying this position: its decision in *Metro Broadcasting, Inc. v. FCC*.[132] By applying strict scrutiny to the program at issue, the Court explicitly overruled its decision in *Metro Broadcasting*, which had applied intermediate scrutiny to a federally enacted affirmative action program.[133] The Court began to surmount this barrier by explaining the difficulty involved in determining which classifications are "benign" and which are "illegitimate."[134] Strict scrutiny, according to the

128. *Id.* The Court first cited the plurality opinion of Justice Powell in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Justice Powell stated there that "any preference based on racial or ethnic criteria must necessarily receive the most searching examination." *Wygant*, 476 U.S. at 273.

129. *Adarand*, 115 S. Ct. at 2111. To illustrate this consistency the Court cited the plurality opinion in *Croson*, which stated that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)). The Court also cited *Bakke* for the proposition that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978)).

130. *Id.* The Court addressed the issue of the difference in language between the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 2105-08. The language of the Fourteenth Amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1, cl. 2. By comparison, the language of the Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. The Court resolved that claims brought under the Fourteenth Amendment and claims brought under the Fifth Amendment are treated the same, since both clauses protect against discriminatory legislation by either the state or federal government. *Adarand*, 115 S. Ct. at 2107-08.

131. *Adarand*, 115 S. Ct. at 2111.

132. 497 U.S. 547 (1990), *overruled by Adarand*, 115 S. Ct. 2097; *see supra* notes 44-51 and accompanying text (discussing the decision in *Metro Broadcasting* and its application of intermediate scrutiny, rather than strict scrutiny, to federally enacted affirmative action programs).

133. *Adarand*, 115 S. Ct. at 2113.

134. *Id.* at 2112 (citations omitted).

Court, is necessary to "'smoke-out' the illegitimate uses of race."[135] The Court also criticized *Metro Broadcasting*'s distinction between federal and state classifications as inconsistent with precedent.[136]

The majority opinion next explained the flexibility of the doctrine of stare decisis. The Court maintained that "remaining true to an 'intrinsically sounder' doctrine established in prior cases can better serve the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it."[137] The Court also pointed out that many commentators have criticized *Metro Broadcasting*'s requirement that a different standard of review apply to federal, as opposed to state, affirmative action programs.[138] The Court also distinguished its decision in *Casey v. Planned Parenthood*,[139] where it had adhered to the doctrine of stare decisis.[140] The Court reasoned that in *Casey*, the decision in *Roe v. Wade*[141] was preserved due to the fact that society had substantially relied on the ability to obtain an abortion.[142] The Court opined that since *Metro Broadcasting* was a departure from its prior affirmative action cases and was a relatively recent decision, overruling the case was unlikely to affect conduct in any way.[143]

The majority was also certain to dispel the notion that strict scrutiny is "strict in theory, fatal in fact."[144] In so doing, the Court relied on the case of *United States v. Paradise*,[145] which held that a race-conscious remedy was sufficiently narrowly tailored to pass the strict scrutiny test.[146] The Court declared that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[147] The Court then remanded the case

135. *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (O'Connor, J.)).

136. *Id.* at 2117. The Court more explicitly stated: "Metro Broadcasting's untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and 'its later misapplications,' the principle must prevail." *Id.*

137. *Id.* at 2115.

138. *Id.* (citations omitted).

139. 505 U.S. 833 (1992).

140. *Adarand*, 115 S. Ct. at 2116.

141. 410 U.S. 113 (1973). *Roe* held that a woman has a constitutional right to abortion. *Id.*

142. *Adarand*, 115 S. Ct. at 2116.

143. *Id.*

144. *Id.* at 2117.

145. 480 U.S. 149 (1987).

146. *Adarand*, 115 S. Ct. at 2117-18.

147. *Id.*

to the lower court to determine if the program was narrowly tailored to serve a compelling interest.[148]

C. *The Concurrences*

Both Justices Scalia and Thomas wrote concurring opinions.[149] Justice Scalia's opinion diverged from that of the rest of the majority by maintaining that strict scrutiny is indeed strict in theory and fatal in fact.[150] Justice Scalia firmly asserted that "the government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. . . . [T]here can be no such thing as a creditor and debtor race."[151] As to whether the program at issue could survive strict scrutiny, Justice Scalia stated that it would be "unlikely, if not impossible."[152]

Justice Thomas concurred to draw attention to the issues of racial paternalism and stigma.[153] It was his belief that affirmative action programs "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[154] In Justice Thomas' opinion, there was no difference between benign discrimination sponsored by the government and racial prejudice.[155]

D. *The Dissents*

Four Justices dissented in *Adarand*: Justices Stevens, Souter, Ginsburg, and Breyer. Each of them wrote an opinion, except for Justice Breyer. Justice Stevens, joined by Justice Ginsburg, wrote the most detailed dissent, criticizing the majority's three propositions of skepti-

148. *Id.* at 2118.

149. *Id.* at 2118 (Scalia, J., concurring); *id.* at 2119 (Thomas, J., concurring).

150. *Id.* at 2118.

151. *Id.*

152. *Id.* at 2119.

153. *Id.*

154. *Id.* Perhaps Justice Thomas' decision was based on his own past experience with affirmative action programs. Justice Thomas was accepted at Yale Law School due partly to "an affirmative action plan to recruit qualified minority students." THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, 527-28 (Claire Cushman ed., Congressional Quarterly 1993). Thomas was "troubled" that he was a "beneficiary of such a plan" and later stated "[y]ou had to prove yourself everyday because the presumption was that you were dumb and didn't deserve to be there on merit." *Id.*

155. *Adarand*, 115 S. Ct. at 2119.

cism, consistency, and congruence.[156] He also criticized the majority's abandonment of the principle of stare decisis.[157]

First, addressing the skepticism issue, Justice Stevens agreed with the majority that the Court should be "wary of a government decision that relies upon a racial classification."[158] However, he did not believe that a "uniform standard" was appropriate.[159]

Second, in regard to consistency, Justice Stevens asserted that "the consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat."[160] Justice Stevens believed that the majority needed to recognize the differences between benign programs, which assist minorities, and invidious ones.[161] To Justice Stevens, the term strict scrutiny "spells the death of any governmental action" examined under its scope.[162] Although the majority suggested that strict scrutiny could be defined as less than strict, Justice Stevens feared that "well-crafted benign programs" would be in danger.[163] He criticized the Court's overreliance on rigid standards of review because "it risks sacrificing common sense at the altar of formal consistency."[164]

Third, Justice Stevens maintained that special deference should be granted to the institutional competence of Congress.[165] In this respect, he was critical of the majority's congruence rationale.[166] Justice Stevens believed that the majority failed to recognize the differences between federal decision makers and local ones.[167] He argued that "federal affirmative-action programs represent the will of our entire

156. *Id.* at 2120-26 (Stevens, J., dissenting).

157. *Id.* at 2120-31. Justice Stevens' opinion in *Adarand* demonstrated that his "experience on the Court has led [him] to shift from his early stance as an affirmative action skeptic to an impassioned supporter." *Justice Set Aside*, NATION, July 10, 1995, at 39; *see* Fullilove v. Klutznick, 448 U.S. 448, 547 (1980) (Stevens, J., dissenting) (arguing that the federally enacted minority set-aside program should be struck down because the ultimate goal must be to eliminate race from governmental decision making).

158. *Adarand*, 115 S. Ct. at 2120.

159. *Id.*

160. *Id.* at 2121.

161. *Id.* at 2120.

162. *Id.* at 2120-21 n.1.

163. *Id.*

164. *Id.* at 2122.

165. *Id.* at 2126.

166. *Id.* at 2123.

167. *Id.* Justice Stevens pointed out that several of the Justices in the majority had previously mentioned the importance of congressional deference in other decisions. Justice Stevens quoted Justice Scalia's concurring opinion in *Croson*: "[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, . . . and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed." *Id.*

Nation's elected representatives" and that Congress has been granted the power, through Section five of the Fourteenth Amendment, to remedy the effects of past discrimination.[168] Thus, the Court should treat programs instituted by the federal government differently than those enacted by the states and municipalities.[169]

Justice Stevens also disagreed with the majority's disregard of the stare decisis doctrine.[170] He characterized the decision as an "unjustified departure from settled law."[171] According to Justice Stevens, it was "wrong for the Court to suggest . . . that overruling *Metro Broadcasting* merely restore[d] the *status quo ante*."[172] Instead, Justice Stevens would have upheld the program at issue under the *Fullilove* standard[173] since the program in *Adarand* was more tailored than the one upheld in *Fullilove*.[174] In addition, Justice Stevens commented on Justice Thomas' theory of "race paternalism."[175] To Justice Stevens, the proposition was extreme.[176] Justice Stevens believed that the benefits of affirmative action outweigh any psychological harm that may occur.[177]

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at 2124 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521-22 (1989)). Justice Stevens also quoted Justice O'Connor's opinion in *Croson*:

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Id. at 2124-25 (quoting *Croson*, 488 U.S. at 490).

168. *Id.* at 2125-26.

169. *Id.* at 2125.

170. *Id.* at 2127.

171. *Id.*

172. *Id.* Justice Stevens referred to the fact that "*Metro Broadcasting* involved a federal program, whereas *Croson* involved a city ordinance." *Id.* Justice Stevens criticized the majority for rejecting this distinction "in the name of congruence," and further asserted that "the law at the time of [*Metro Broadcasting*] was entirely open to the result the Court reached." *Id.* In other words, *Metro Broadcasting* itself was not a departure from settled law. *Id.*

173. *See supra* notes 31-37 and accompanying text (discussing the standard articulated in *Fullilove* to uphold a federally enacted affirmative action program).

174. *Adarand*, 115 S. Ct. at 2128.

175. *Id.* at 2122-23 n.5.

176. *Id.* Justice Stevens stated: "It is one thing to question the wisdom of affirmative-action programs. . . . [I]t is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots." *Id.*

177. *Id.* Justice Stevens further articulated:

> I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. . . . I do not believe such action, whether wise or unwise, deserves such an invidious label as "racial paternalism" . . . . If the

Justice Souter also wrote a dissenting opinion in which Justices Ginsburg and Breyer joined.[178] Justice Souter argued that the question of the appropriate standard of review should not have been reached by the Court.[179] Rather, the only issue on appeal was whether, under *Croson*, an agency needed to make particularized findings of discrimination.[180] Nevertheless, Justice Souter agreed with Justice Stevens that the doctrine of stare decisis mandates the application of *Fullilove*.[181] Justice Souter also added that the majority's recognition that the application of strict scrutiny can result in the survival of a classification might indicate that equal protection is more elastic than the categories suggest.[182]

Finally, the two most junior members of the Court, Justices Ginsburg and Breyer, joined together in dissent. Justice Ginsburg began her dissenting opinion by stating that it was not the place of the Court to intervene in this matter since Congress was competent to deal with the issue of affirmative action.[183] Instead of accentuating the differences between the majority and dissenting opinions, Justice Ginsburg pointed out that in several respects the individual Justices had all reached a common ground.[184] Justice Ginsburg asserted that all members of the Court agreed that racial discrimination is a persistent reality and that Congress has been granted the authority to end it.[185] Justice Ginsburg next discussed the strict scrutiny issue. She characterized the majority's version of strict scrutiny as "fatal for classifications burdening groups that have suffered discrimination in our society."[186] However, Justice Ginsburg also noted that for affirmative action classifications, the standard is not fatal in fact.[187] Justice Ginsburg articulated that this type of scrutiny is beneficial because it differentiates between "classifications [which are] in reality malign, but

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legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. *Id.* (citations omitted).

178. *Id.* at 2131 (Souter, J., dissenting).

179. *Id.*

180. *Id.*

181. *Id.* at 2132. *But cf.* Koehler, *supra* note 105, at 883 (arguing that in *Planned Parenthood v. Casey*, 502 U.S. 1056 (1992), Justice Souter defamed the idea of stare decisis by "resort[ing] to the neutral rhetoric of *stare decisis* to disguise his own value judgments and acknowledgment of social pressure").

182. *Adarand*, 115 S. Ct. at 2132.

183. *Id.* at 2134 (Ginsburg, J., dissenting).

184. *Id.*

185. *Id.* at 2135.

186. *Id.* at 2136.

187. *Id.*

masquerading as benign."[188] Justice Ginsburg concluded that she would uphold the program at issue, but recognized that improvement in the area of affirmative action may be necessary.[189] According to Justice Ginsburg, however, this would be a task for the political branches.[190]

III. ANALYSIS

Prior to the *Adarand* decision, the law of affirmative action was clearly in a state of unrest. Although the *Adarand* Court managed to reach a consensus, the battle between colorblindness and remedial measures was still evident in the opinions of the various Justices.[191] In fact, the ideologies of the individual Justices played an important role in the Court's mistreatment of three important issues:[192] the appropriate standard of review for affirmative action,[193] the boundaries of the relationship between Congress and the Court,[194] and the role of stare decisis.[195] The following analysis focuses on these three issues in order to demonstrate that the *Adarand* decision is in error.

In the next subsection, the author illustrates the illogical result of the Court's application of strict scrutiny to affirmative action programs. As the author explains, if strict scrutiny is defined as fatal in

188. *Id.* at 2134.

189. *Id.* at 2136.

190. *Id.*

191. *See supra* notes 124-90 and accompanying text (discussing the individual views of the Justices in the *Adarand* decision).

192. This conclusion is supported by the fact that the dissent in *Metro Broadcasting* quickly became the majority in *Adarand* with the addition of Justice Thomas. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602-03 (1990) (O'Connor, J., dissenting) (stating the dissenters'—Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia—view that strict scrutiny was the appropriate standard of review for racial classifications). Since *Metro Broadcasting*, the composition of the Court had changed. Justices Marshall, Brennan, Blackmun, and White departed from the Court. They were replaced by Justices Thomas, Souter, Ginsburg, and Breyer.

From the time of his nomination, it was accurately predicted that Justice Thomas would be opposed to affirmative action measures. Ted Gest, *Thomas's Bias Cases*, U.S. NEWS & WORLD REP., Nov. 7, 1994, at 63. "His views on affirmative action were shaped . . . by his grandfather who taught him that hard work and discipline were the ways to overcome discrimination." *Id.* Justice Thomas' view, and that of other conservatives, is that remedies should be limited to individuals who can prove that they were directly victimized by bigotry. *Id.*

By contrast, two other recently appointed Justices had supported affirmative action programs in the past. As Chief Judge for the U.S. Court of Appeals for the First Circuit, Justice Breyer upheld affirmative action programs. Kenneth A. Martin, *Is This the End of Federal Minority Contracting*, 42 FED. LAW. 44, 47 (Feb., 1995) (citing Stuart v. Roche, 951 U.S. 446 (1st Cir. 1991)). Similarly, as an appellate court judge, Justice Ginsburg also voted in favor of federally enacted affirmative action programs. *Id.* (citing Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992)).

193. *See supra* notes 83-84 and accompanying text.

194. *See supra* notes 85-93 and accompanying text.

195. *See supra* notes 94-107 and accompanying text.

fact, *Adarand* will result in the abolition of remedial measures which have long promoted the goal of equality. On the other hand, if strict scrutiny is not fatal to the racial classification at issue, minorities will no longer be able to rely on strict scrutiny as a shield from invidious discrimination. To add to these definitional problems, the author posits that a new standard of review has been introduced in *Adarand*. This standard would fall between strict and intermediate scrutiny. The author evaluates this new standard alongside of other alternatives proposed by various legal commentators.

In the following two subsections, the author briefly discusses the ramifications that the application of strict scrutiny will have on the relationship between Congress and the Court and the doctrine of stare decisis. Finally, the author proposes that the application of intermediate scrutiny would have circumvented these three problems.

A. Strict Scrutiny: The Search for a Definition

The Court's application of strict scrutiny to federally enacted affirmative action programs is problematic. In the interest of operating in a strictly colorblind fashion, the Court failed to recognize the pragmatic ramifications of its decision. In particular, the Court erred when it failed to provide a clear definition of the term "strict scrutiny."[196] Is strict scrutiny still fatal in fact? Or, has the Court created a new, more lenient definition of strict scrutiny? Instead of providing a consistent rule to govern affirmative action, the Court in *Adarand* left more questions than it answered. The author proposes that the Court could have eliminated these problems by applying the intermediate scrutiny standard of review.

1. Is Strict Scrutiny Still Fatal in Fact?

If the fatal in fact standard is applied to benign affirmative action programs, the result is inconsistent with the goal of equality. In traditional Equal Protection jurisprudence, the role of strict scrutiny has been that of protector.[197] It has sheltered minorities from invidious discrimination by striking down virtually all legislation which classifies on the basis of race.[198] However, when this same strict scrutiny is ap-

196. Justice O'Connor was certain to dispel the notion that strict scrutiny meant "strict in theory, fatal in fact." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995). On the other hand, Justice Scalia explicitly stated that it would be "impossible" for the program at issue to meet the strict scrutiny test. *Id.* at 2119 (Scalia, J., concurring).

197. *See supra* note 8 and accompanying text (providing examples of where the Court has utilized the Equal Protection Clause to protect individuals from discrimination).

198. *See supra* notes 68-70 and accompanying text (arguing that strict scrutiny is "strict in theory and fatal in fact").

plied to remedial affirmative action measures the results are incongruous.[199] Legislatures are paralyzed from enacting programs that remedy race discrimination, yet they still have the ability to enact programs that remedy gender discrimination which are reviewed under intermediate scrutiny.[200] This occurs despite the fact that the purpose of the Equal Protection Clause was to end racial discrimination.[201] The majority, however, either did not recognize this problem or chose to ignore it.

Despite the fallacies inherent in the application of strict scrutiny, there are persuasive arguments for eliminating affirmative action.[202]

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199. This problem is best characterized by the U.S. District Court for the Eastern District of Pennsylvania in *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 735 F. Supp. 1274 (E.D. Pa. 1990). The court stated:

> In the non-affirmative action context the use of a three-tiered analysis for ordinances disadvantaging blacks, women or non-suspect classifications creates the result intended by the Supreme Court—it is most difficult to uphold a classification disadvantaging blacks, less difficult to uphold a classification disadvantaging women, and easiest to uphold a classification disadvantaging a non-suspect class. However, in the affirmative action setting the use of a three-tiered scheme means that laws disadvantaging whites . . . will be held to a stricter standard than laws disadvantaging men. . . . The flip-side of this is that under the sliding scale analysis, it becomes easier for a state legislature or a city council to pass [a female-owned business enterprise program than a minority owned business enterprise program] . . . because the former will be held to a lesser standard of scrutiny by the courts.

Id. at 1302.

200. *See* Holly Dyer, *Gender-Based Affirmative Action: Where Does It Fit in the Tiered Scheme of Equal Protection Scrutiny*, 41 U. KAN. L. REV. 591, 600 (1993) (presenting the same problem and making the argument that a gender-based program is more likely to be upheld even though the court views gender discrimination as less invidious than race discrimination).

201. *Adarand*, 115 S. Ct. at 2121 (Stevens, J., dissenting). "[T]oday's lecture about 'consistency' will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves." *Id.* at 2122.

202. *See, e.g.*, John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 314 (1994). The author lists several arguments against affirmative action:

> Affirmative action is not colorblind, because it intentionally invokes racial classifications.
>
> Affirmative action is not based on individuals, but on groups.
>
> Affirmative action is not based on merit.
>
> Affirmative action leads to racial politics and backlash in the form of white extremists.
>
> Affirmative action is exploited by middle-class African-Americans.
>
> Affirmative action stigmatizes its intended "beneficiaries".
>
> Affirmative action is social engineering, demanding equal results rather than equal opportunity.
>
> Affirmative action victimizes innocent (white) workers.

Id.

At first blush, the Court's decision in *Adarand* may seem desirable. This negative view of affirmative action is reflected in the concurrences of Justices Scalia and Thomas.

The concurring opinion of Justice Scalia[203] reflects the sentiments of those individuals who support the annihilation of affirmative action programs. Justice Scalia took the strict interpretivist view that the Constitution prohibits discrimination against *any* race. Justice Scalia also argued that one race should not have to now incur a debt, i.e., discriminatory treatment, to "make up" for the discriminatory practices of the past.[204] He asserted:

> To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the government we are just one race here. It is American.[205]

Thus, Justice Scalia remained true to the position that he articulated in *Croson*—that racial preferences should not be used to "even the score" between African-Americans and Caucasians.[206] To do so only furthers the notion that it is appropriate for our society to be divided into races.[207]

Similarly, Justice Thomas was concerned that affirmative action programs would stigmatize minorities and promote the idea of race-paternalism.[208] This argument is persuasive because it indicates that affirmative action militates against the idea of individualism, which the Equal Protection Clause is supposed to protect and, instead, focuses on the inferiority of minority groups.[209] In support of Thomas, it can also be said that the mere fact that the Court or Congress

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203. *Adarand*, 115 S. Ct. at 2118-19.

204. *Id.* at 2118; *see supra* notes 149-52 and accompanying text (discussing the concurring opinion of Justice Scalia and his rejection of the notion that there is a "debtor" and a "creditor" race).

205. *Adarand*, 115 S. Ct. at 2119.

206. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring).

207. *Id.*

208. *Adarand*, 115 S. Ct. at 2119. There are counter-arguments which can be made to Justice Thomas' idea of stigma. *See* Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 93 (1994) (arguing that there is symbolic value in increased minority participation in businesses and in positions of respect and authority, although there is the potential for stigma).

209. *See* Morrison, *supra* note 202, at 342-43 (discussing the arguments of stigma and individuality). The stigma argument was also recently addressed in the case of *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). *See infra* notes 268-69 and accompanying text (discussing the *Hopwood* opinion and its interpretation of the *Adarand* decision). In *Hopwood*, the court recognized that the stigma argument can be traced back to *Brown v. Board of Education* where the Supreme Court held that "classification on the basis of race 'generates a feeling of inferiority.'" *Hopwood*, 78 F.3d at 947 (citing Brown v. Board of Educ., 347 U.S. 483, 494 (1954)). The *Hopwood*

chooses to focus on differences poses the risk of recreating differences and reinforcing stereotypes.[210]

The underlying theme of both the majority opinion and Justice Thomas' concurrence is the idea that colorblindness is beneficial to African-Americans. Indeed, colorblindness would be ideal were it not for the past history and present reality of racial discrimination. As one legal scholar explains, colorblindness has been mythologized by many Americans as a moral means for achieving racial justice, when, indeed, colorblindness merely maintains the status quo.[211] There are additional down sides to colorblindness as well. For example, colorblindness ignores ethnic backgrounds and fails to recognize that ethnicity is an important part of individual identity.[212]

Although the arguments for colorblindness are forceful, they are not strong enough to support the elimination of affirmative action

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court also cited the language of one renowned constitutional law scholar to support the argument that government-enacted affirmative action plans stigmatize minorities:

> The message from government is written very large when these plans proliferate: a double (and softer) standard for admission . . . , a double (and softer) standard for promotion, a double (and softer) standard for competitive bidding, and so on. Without question, this is a systematic racial tagging by government—a communication to others that the race of the individual they deal with bespeaks a race-related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions.

Id. at 947 n.34 (citing William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 787 n.38 (1979)).

210. Martha Minow, *The Supreme Court 1986 Term, Foreward, Justice Engendered*, 101 HARV. L. REV. 10, 12 (1986).

211. Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994). Professor Culp also explains that the Constitution itself is ineptly colorblind if the history surrounding the enactment of the Constitution is examined:

> The white men who adopted the Constitution refused to put the words "race," "color," or "slavery" anywhere in its text. The Constitution was thus formally "neutral" toward race, slavery, and color. This conscious decision to be colorblind, of course, did not prevent the creators of the American constitutional order from accepting the pernicious American form of slavery. The Constitution was, in modern constitutional parlance, facially neutral while protecting racial subjugation by private parties and even governmental entities.

Id. at 171. In other words, colorblindness sustains the social arrangements that presently exist and, in doing so, assumes that discrimination has been completely obliterated. *Id.*

212. Clarence Page, *The Rudeness of Race*, CHI. TRIB., Feb. 11, 1996, § 10, at 12-13. The author provides an African-American viewpoint on colorblindness:

> I would argue that too much has been made of the virtue of "colorblindness." I don't want Americans to be blind to my color as long as color continues to make a profound difference in determining life chances and opportunities. Nor do I wish to see so significant a part of my identity denied. . . . Today I live a well-integrated life in the suburbs. Black folks still tell me how to be "black" when I stray from the racial party lines, while white folks tell me how to be "colorblind."

Id.

through the vehicle of a strict scrutiny. On balance, Justice Stevens stated that he did not believe that "the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination."[213] Even today, racial subordination remains pervasive.[214] It is a societal ailment that necessitates treatment, not avoidance. Race-conscious remedies are the only means by which racial discrimination can be eliminated.[215]

2. *The Birth of a New Standard of Review?*

The indication by the majority that strict scrutiny may not be fatal in fact also produces untenable results. The majority articulated that it is indeed feasible that affirmative action legislation could pass the strict scrutiny test.[216] However, in the non-affirmative action context, a definition of strict scrutiny that is less than strict may not protect minorities from impermissible uses of race as it was originally intended to do.[217]

The Court's indication that strict scrutiny is something less than strict is a radical departure from prior case law.[218] Since *Korematsu*,[219] the Court has generally refused to allow a classification to pass the strict scrutiny test. To suddenly allow a classification to pass strict scrutiny, as proposed in *Adarand*, would significantly water down the meaning of the term. Justice Souter alluded to this point in his dissent when he stated that "the Court's very recognition . . . that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest."[220]

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213. *Adarand*, 115 S. Ct. at 2123 n.5 (Stevens, J., dissenting).

214. Page, *supra* note 212, at 13. The author explains that in 1865, as newly freed slaves, African-Americans controlled three percent of the wealth in America. Today, African-Americans still only control three percent of the wealth in America. *Id.*

215. The opinion of Justice Blackmun in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), is illuminating here. Justice Blackmun stated: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." *Id.* at 407.

216. *Adarand*, 115 S. Ct. at 2117.

217. For example, what would be the result of a case like *Loving v. Virginia*, 338 U.S. 1 (1967), if the term strict scrutiny were viewed as less then strict? *See supra* note 8 and accompanying text (discussing how the Equal Protection Clause has served to protect individuals from discrimination and citing the *Loving* case as an example).

218. *See supra* notes 61-71 and accompanying text (discussing the application of the strict scrutiny test).

219. Korematsu v. United States, 323 U.S. 214 (1944). In *Korematsu*, where the government made a racially based classification which excluded Japanese Americans from certain military areas which encompassed their homes, the Supreme Court upheld the classification under strict scrutiny. *Id.*

220. *Adarand*, 115 S. Ct. at 2132 (Souter, J., dissenting).

Alternatively, Justice O'Connor's opinion could be interpreted as creating an entirely new standard of review, rather than just a watering down of the strict scrutiny standard. This new tier would apparently fall between the traditional fatal in fact strict scrutiny and intermediate scrutiny.[221]

If Justice O'Connor did indeed create a new standard of review in *Adarand*, the question then becomes: what does this new standard require? Justice O'Connor stated in the majority opinion that the narrowly tailored prong of the test would still need to be met.[222] However, even with a more lenient standard in place, it is unlikely that any government program would be sufficiently narrowly tailored to pass the test.[223] This is due to the fact that federal affirmative action programs are directed at the entire nation, while the discrimination that these programs redress may differ from locality to locality.[224] Additionally, Justice O'Connor's opinion provides no insight as to whether this new standard of review would be strictly confined to the affirmative action context. In order for this new standard of review to operate effectively in practice, these questions must first be addressed by the Court.

Consequently, the decision in *Adarand* left the lower courts to contend with the problem of interpretation and, thus, presents a dilemma. If the lower courts determine that the program at issue does not withstand strict scrutiny, this could signal the death of affirmative action programs. On the other hand, if the program does withstand strict scrutiny, then the meaning of the term may either be watered down[225] or the traditional understanding of the standards of review may be significantly altered with the addition of a new level of scrutiny.

3. *Alternatives to Strict Scrutiny*

The Court could have avoided these definitional problems entirely had it decided this case in a different manner. First, as seen in *Metro Broadcasting*, intermediate scrutiny seems to better serve the needs of affirmative action programs. Intermediate scrutiny allows the govern-

221. *See supra* notes 61-82 and accompanying text (defining the relationship between strict scrutiny and intermediate scrutiny).

222. *Adarand*, 115 S. Ct. at 2117.

223. *See supra* note 42 and accompanying text (discussing the requirements of the narrowly tailored prong of strict scrutiny in the affirmative action context).

224. *See* Marcia Coyle, *Is a Kinder and Gentler Strict Scrutiny in the Cards?*, NAT'L. L.J., June 26, 1995, at A16 (discussing the difficulties with requiring federal affirmative action programs to be narrowly tailored).

225. *See supra* notes 216-20 and accompanying text (discussing the ramifications of a lenient definition of strict scrutiny).

ment some leeway in crafting programs, but still subjects those programs to a standard of review that has some bite.[226]

A second alternative would be to take affirmative action out of the tiers of scrutiny entirely and, instead, utilize the test proposed by Justice Stevens in *City of Cleburne v. Cleburne Living Center, Inc.*[227] This test would require a court to ask several questions to determine if a program is constitutional: "(1) What class is benefitted from the measure? (2) Has it been subjected to invidious past discrimination? (3) What is the characteristic of the class that justifies extraordinary treatment? (4) What is the public purpose being served by the measure?"[228] The advantage of this test is that it is not as rigid as the traditional test and allows for "both individual and group treatment theories [to] play a role."[229]

Third, Professor Shaman recommended the use of the unified standard in equal protection cases which would combine the three current levels of scrutiny into one formula.[230] According to that standard, the inquiry in all instances would be "whether there is an appropriate governmental interest suitably furthered by the governmental action in question."[231] This approach would allow more flexibility for the Court in that it would not be forced to find a level of review that fits each circumstance and it could instead focus on the merits of each case.[232] However, because this approach evaluates the totality of the circumstances, it may not provide lower courts with the guidance that is needed in equal protection cases. Thus, intermediate scrutiny appears to be the most viable alternative.[233]

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226. *See* Dyer, *supra* note 200, at 611 (proposing that intermediate scrutiny would be the appropriate standard of review for affirmative action, in that benign classifications can be considered quasi-suspect); *see supra* notes 75-79 and accompanying text (discussing the bite of intermediate scrutiny).

227. 473 U.S. 432, 452-53 (1985) (Stevens, J., concurring).

228. Dyer, *supra* note 200, at 612-13. Dyer based her test on that created by Justice Stevens in his concurring opinion in *City of Cleburne*. *Id.* (citing *City of Cleburne*, 473 U.S. at 453 (Stevens, J., concurring)).

229. *Id.* at 612.

230. Shaman, *supra* note 72, at 177.

231. *Id.* (quoting Chicago Police Dept. v. Moseley, 408 U.S. 92, 95 (1972)).

232. *Id.* Professor Shaman also noted that the unified standard might "reduce the harshness of strict scrutiny" due to the fact that even legislation which is directed at a suspect class would be upheld if it "suitably furthers an appropriate governmental purpose." *Id.* at 181.

233. Aside from these tests, there is also an argument that the entire focus of affirmative action should be redefined. This proposal would use poverty as grounds for special consideration in hiring, rather than race or gender. *See Justice Set Aside*, *supra* note 157, at 39. In support of this proposal, it can be argued that the right of equal protection in itself is concerned with class. However, it is unlikely that a view of this type would gain popular support with civil rights defenders. *Id.*

B. The Court and Congress: Allies or Adversaries?

The Court's application of strict scrutiny to congressional decision making shows a fundamental distrust of the legislature. As mentioned above, this decision may paralyze Congress such that no affirmative action legislation will be able to pass judicial scrutiny. The Court's decision ignores the fact that Congress is a direct representative of the people and has been given the authority to enact equal protection legislation through the language of the Fourteenth Amendment.[234] In *Adarand*, the Court clearly overstepped the boundaries of its relationship with Congress, demonstrating a disregard for the doctrine of separation of powers.

Interestingly, as Justice Stevens pointed out, the majority's distrust of the legislature in *Adarand* is a radical departure from prior decisions.[235] Justice Stevens asserted that the differences between a decision by Congress and a decision by a state or municipality have been repeatedly recognized by the same members of the Court who disregarded this distinction in *Adarand*.[236] For instance, Justice Scalia's opinion in *Croson* pinpointed the reason for the distinction between federal and local governments: ". . . racial discrimination against any group finds a more ready expression at the state and local level than at the federal level."[237] The *Adarand* decision, however, goes against this notion and refuses to grant to Congress the deference that it has traditionally been accorded.

Another argument for deference to Congress is that the group discriminated against in *Adarand*, and in affirmative action legislation generally, is the majority, Caucasian males. As Professor Robert C. Power explained, "[i]f a decisionmaker disadvantages itself (or a group to which a majority of the lawmakers belong), there is no rea-

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234. Congress is granted this power through section five of the Fourteenth Amendment, which reads, "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

235. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2123 (1995).

236. *Id.*

237. 488 U.S. 469, 521 (1989). In support of this proposition, Justice Scalia cited to the words of James Madison in THE FEDERALIST NO. 10:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

Id. (citing THE FEDERALIST NO. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961)).

son to distrust the process and deferential review would be appropriate."[238] He further commented that the idea is that decision makers "would not act against their own interests" were it not for a good reason.[239] In other words, the application of strict scrutiny would not be necessary, since the majority has the ability to protect its interests through the political process and does not need the aid of strict scrutiny as do minorities.

The refusal of the Court to defer to Congress also speaks volumes about the Court's view of its own role. Indeed, this judicial distrust of the legislature can be asserted as the reason why affirmative action is so controversial.[240] As one commentator has pointed out, the *Adarand* decision has deprived the American public of the opportunity to be heard on the issue of affirmative action.[241] It is Congress, the direct representative of the people, who should decide the fate of affirmative action.[242]

In this regard, Justice Ginsburg correctly argued that it is not the place of the Court to decide the future of affirmative action.[243] It is Congress, not the Court, that has the resources and ability to examine the feasibility of these types of programs. Nevertheless, the majority chose to make the courts, not Congress, the "day-to-day arbiter of racial equality in the workplace."[244] These problems point to the need for a more lenient standard of review for affirmative action.

C. *Stare Decisis: To Be or Not to Be?*

The *Adarand* case exemplifies the notion that the application of the doctrine of stare decisis depends upon the ideology of the individual Justices.[245] The concept of stare decisis puts an implicit constraint on each Justice every time a decision is rendered.[246] However, when the

238. Power, *supra* note 208, at 100-01.

239. *Id.* at 101 n.53.

240. *The End of Affirmative Action*, NEW REPUBLIC, July 3, 1995, at 7.

241. *Id.*

242. *Id.* As this commentator further explained: "If federal racial preferences are ended—and we think they should be ended—this historical decision should be announced not by Sandra Day O'Connor but by the Congress of the United States." *Id.*

243. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2136 (1995).

244. *Justice Set Aside*, *supra* note 157, at 39.

245. *See supra* notes 105-06 and accompanying text (discussing the idea that adherence to the Court's precedent depends largely upon the individual members of the Court).

246. Padden, *supra* note 104, at 1693. This commentator explained:

> Because precedent constrains the current Justices, each Justice will try to avoid precedent with which she disagrees. When a Justice does adhere to stare decisis, however, she must make a decision that may be less than optimal with regard to the particular facts of the case before her in order to adhere to the precedent. Even if no precedent

Court in *Adarand* embraced strict scrutiny, it ignored the doctrine of stare decisis.[247]

The Justices' arguments for the abandonment of stare decisis have little persuasive value. Justice O'Connor, joined by Justice Kennedy, provided support for the Court's departure from established precedent by indicating that commentators have criticized *Metro Broadcasting* as unworkable.[248] This argument is difficult to accept. It is unlikely that the Court succumbed so easily to public opinion. As further support, Justice O'Connor also stated that, in contrast to the situation in *Casey*, there was no fear that overruling the decision would harm members of society who have relied upon it.[249]

Only Justices O'Connor and Kennedy bothered to explain their rationale for departing from precedent.[250] Chief Justice Rehnquist, Justice Scalia, and Justice Thomas failed to provide any support for their departure.[251] As one commentator has argued, both Chief Justice Rehnquist and Justice Scalia, however, have developed a relatively new approach to the doctrine of stare decisis.[252] This approach, seemingly at work in *Adarand*, reduces the precedential value of five-to-four decisions as well as those decisions that were recently decided.[253] Since *Metro Broadcasting* was a five-to-four decision, applying the Rehnquist-Scalia view espoused by this same commentator, this decision should not carry as much weight.[254] In addition, the rationale for overruling recent decisions may be that the Court can correct an error in decision making before there is any reliance on it.[255]

Nevertheless, the decision to overrule *Metro Broadcasting* appears to be more of an ideological change, due to the changing composition of the Court, rather than an intentional abandonment of the doctrine of stare decisis. This, however, is also undesirable. As the above commentator has stated, "making stare decisis a function of Court politics

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exists, the concept of stare decisis still constrains a deciding Justice because she will realize that she is creating a precedent for future decisionmakers.

Id.

247. The majority explicitly overruled the decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which held that federally enacted affirmative action programs are to be reviewed under the intermediate scrutiny standard. *Adarand*, 115 S. Ct. at 2113.

248. *Id.* at 2115.

249. *Id.* at 2116; *see supra* notes 96-101 and accompanying text (discussing the Court's refusal to overrule *Roe v. Wade* due to society's reliance on it).

250. *Adarand*, 115 S. Ct. at 2127 n.12 (Stevens, J., dissenting).

251. *Id.*

252. Padden, *supra* note 104, at 1689.

253. *Id.*

254. *Id.*

255. *Id.* at 1718.

would leave it without any independent force . . . [and] stare decisis would indeed be a truism: a precedent would deserve continuing support when it has continuing support from the current members of the Court."[256] Instead, the Court should strive to place more value on its precedents in the interest of forming sound, coherent doctrines and developing a more principled basis for deciding cases.

D. Affirmative Action's Savior: Intermediate Scrutiny

As the above discussion indicates, strict scrutiny is the root of the Court's problems in *Adarand*. In evaluating the various alternatives proposed by the commentators, it appears that it would have been more feasible, and desirable, for the Court to apply intermediate scrutiny to federally enacted affirmative action programs. Thus, the Court would have remained true to the *Metro Broadcasting* decision. This would have eliminated the necessity for a new definition of strict scrutiny and would allow familiar standards of review to remain intact. It would also allow Congress the necessary latitude to create affirmative action programs. It could be argued that, in practice, Justice O'Connor's version of strict scrutiny may lead to the exact same results as intermediate scrutiny. The retention of the narrowly tailored prong of strict scrutiny, however, indicates that the distinction between the new level of review and intermediate scrutiny is more than just semantic. As a result, many federally created affirmative action programs will be unnecessarily eliminated or put at risk.

Nevertheless, even if the lower courts interpret *Adarand* as commanding the elimination of affirmative action programs, it can be argued that this still does not mean the death of affirmative action. Businesses, even without the mandate of specific quotas, will still attempt to integrate the policies of affirmative action into their hiring practices for the simple reason that in an ethnically diverse society this makes economic sense.[257] Although there is some solace in this idea,

256. *Id.* at 1712. This commentator added:

> Even though recent cases are not immune to being overruled, the change of one Justice's vote in a short period of time is not in itself sufficient reason to abandon a precedent. . . . [A] reversal fueled by a mere change in the Court's personnel is particularly damaging to the Court's image as a neutral decisionmaker. . . . [B]ecause it is a Constitution that the Court is expounding, a mere change in the expounders should not lead to rapid fluctuations in interpretations.

Id. at 1719.

257. James P. Pinkerton, *Why Affirmative Action Won't Die: Republicans, The Courts and California Have Declared War on It. But Racial Preference Policies Have Two Things Going for Them: Economic Logic—and Lawyers*, FORTUNE, Nov. 13, 1995, at 192; *see also* Power, *supra* note 208, at 93 (arguing that symbolism plays a role in the affirmative action context and that there is "symbolic value of increased minority participation in businesses").

for minorities who still suffer from the effects of racial discrimination, this may not be enough. As the next section illustrates, the impact of the *Adarand* decision will be harsh.

IV. IMPACT

A. The Strict Scrutiny Dilemma

In the aftermath of *Adarand*, as discussed above, lower courts will be faced with a dilemma. They have the choice of applying the traditional "fatal in fact" version of strict scrutiny or the newly developed standard of review which seems to be less then strict. Regardless of which they choose, the outcome will be the same: the end of affirmative action as we know it. Even if some affirmative action programs are upheld under the new standard of review, many will undoubtedly be eliminated. Moreover, the legislature may be chilled from enacting any new affirmative action legislation.

The dilemma described above has already been confronted by several courts. For example, in *Shuford v. Alabama State Board of Education*,[258] the Middle District of Alabama upheld a consent decree requiring race-conscious promotion and hiring practices in a school district using strict scrutiny. The court reasoned that the hiring practices were sufficiently narrowly tailored[259] to meet the compelling interest of remedying past discrimination.[260]

Similarly, in *Alexander v. Prince George's County, Maryland*,[261] applicants for firefighter positions challenged the County's affirmative action hiring plan. The United States District Court applied strict scrutiny, citing *Adarand*, and upheld the plan.[262] The court indicated that the plan was narrowly tailored since there were no alternative remedies available, the plan was limited in duration, and the plan did not require the department to hire a certain number of minorities.[263] In addition, the court considered the impact of the plan on innocent third parties.[264]

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258. 897 F. Supp. 1535 (M.D. Ala. 1995).

259. The court looked at four factors to determine if the program was narrowly tailored: "the necessity for the relief and the efficacy of alternate remedies; the flexibility and duration of the relief . . . ; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* at 1568-69 (quoting United States v. Paradise, 480 U.S. 149, 171 (1987)).

260. *Id.* at 1568-70.

261. 901 F. Supp. 986 (D. Md. 1995).

262. *Id.* at 992-95.

263. *Id.* at 995.

264. *Id.* at 996.

Although the above-mentioned cases illustrate that affirmative action programs can withstand strict scrutiny, another court has decided otherwise. Under facts similar to *Adarand*, the court in *Cornelius v. Los Angeles County Metropolitan Transportation Authority*[265] held that a Disadvantaged Business Enterprise (DBE) program could not pass strict scrutiny.[266] The transit authority did not identify a pattern of discrimination and, thus, failed to justify the imposition of preferences to minorities.[267] Similarly, the Fifth Circuit, in *Hopwood v. Texas*, recently held that a law school could not use race as a factor for determining admissions and that racial diversity was not a sufficiently compelling interest to meet the strict scrutiny test.[268] As to the application of strict scrutiny, the court cited *Adarand* and stated that "there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as 'benign' or 'remedial.'"[269]

The incongruous results reached by the above-mentioned courts demonstrate a key problem with the *Adarand* decision: it fails to provide any guidance to the lower courts. Instead of clarifying the law of affirmative action through *Adarand*, the Court has instead muddled it further. Thus, the future of affirmative action jurisprudence is left undetermined, much like it was prior to the *Adarand* decision.[270]

B. Redefining a Relationship

The lower courts are not the only body left to contend with the *Adarand* decision. Both the legislative and executive branches of the federal government have addressed the issue of the future of affirmative action after *Adarand*.

The affirmative action program at issue in *Adarand* is one of 160 affirmative action programs created by Congress.[271] These programs direct approximately $10 billion to minority firms every year.[272] With *Croson* as a guide, Congress is currently evaluating these programs to

265. No. BC 101913, 1995 WL 499822, at *1 (Cal. Super. Ct. July 27, 1995).

266. *Id.* at *3.

267. *Id.*

268. 78 F.3d 932, 962 (1996).

269. *Id.* at 940. However, in his concurring opinion, Justice Wiener disagreed with this interpretation of the *Adarand* decision: "Justice O'Connor expressly states that *Adarand* is not the death knell of affirmative action—to which I would add, especially not in the framework of achieving diversity in public graduate schools." *Id.* at 963-64.

270. *See supra* notes 20-51 and accompanying text (tracing the Court's affirmative action jurisprudence from *Bakke* through *Metro Broadcasting*).

271. Charles Oliver, *Is Affirmative Action In or Out? Supreme Court Ruling Will Take Years to Sort Out*, INVESTOR'S BUS. DAILY, June 28, 1995, at A1.

272. *Id.*

determine if they meet strict scrutiny.[273] In addition, President Clinton has directed that any affirmative action program must be eliminated or reformed if the program meets the following conditions: (1) it creates a quota; (2) it creates preference for unqualified individuals; (3) it creates reverse discrimination; or (4) it continues after its equal opportunity purposes have been achieved.[274]

The effect of the *Adarand* decision on these programs may be predicted by evaluating the results of *Croson*. In *Croson*, the Court applied strict scrutiny to state and local affirmative action programs.[275] Within a year of *Croson*, nearly all state and local minority set-aside programs had come to an end.[276] However, many of these programs were later restored when states and localities paid for studies to explicitly demonstrate that wrongs had occurred.[277] Nevertheless, when the minority set-asides ended pursuant to *Croson*, the minority share of construction dollars dropped from approximately forty percent to two percent.[278] This situation demonstrates the need for remedial affirmative action programs. If the post-*Croson* situation is an accurate predictor, the *Adarand* decision may severely injure those minorities that the Court intended to protect.

Aside from injuring minorities, the *Adarand* decision will also damage the relationship between Congress and the Court. As one court in a post-*Adarand* decision has recently commented:

> There is value in a democracy in permitting the people, directly and through their representatives, to wrestle with these hard issues, which are manifestations of enduring, historical dilemmas. . . . [P]erhaps this country is finally ready to embrace the ideal that we

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273. *Re: Adarand Constructors, Inc. v. Pena: Hearings before the Senate Comm. on the Judiciary, Subcomm. on the Constitution and Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 104th Cong. (September 22, 1995) (statement of Associate Attorney General John R. Schmidt), *available in* Fed. News Serv.-Cong. Hearing Testimonies 1995 WL 10388398. The Associate Attorney General stated that there are six questions to be used as the basis for evaluation of affirmative action programs:

> (1) [T]he manner in which race is used in the programs (e.g., as an exclusive factor or one among many), (2) whether non-racial alternatives are or have been considered, (3) whether the program permits waiver of race as a factor in decisionmaking, (4) the manner in which any numerical goal was calculated, (5) whether there is a continuing need for the program or whether it has outlived its justification, and (6) the burden that is imposed on non-beneficiaries of the program.

Id.

274. President's Memorandum for Heads of Executive Departments and Agencies on the Evaluation of Affirmative Action Programs, 31 WEEKLY COMP. PRES. DOC. 1264 (July 17, 1995).

275. *See supra* notes 39-43 and accompanying text (discussing the *Croson* decision to apply strict scrutiny to state and local affirmative action programs).

276. Oliver, *supra* note 271, at A2.

277. *Id.*

278. *Id.*

> will operate legally as a color blind society. However, if unelected judges unnecessarily short-circuit the political debate, we may never know for sure.[279]

The Court's limitation of the authority of Congress has been a trend of the Court during the 1994-1995 term. The Court appears to have set new parameters for its future relationship with Congress. In addition to *Adarand*, the Court also limited the powers of Congress in *United States v. Lopez*.[280] In *Lopez*, the Court held that Congress had exceeded its authority under the Commerce Clause by enacting the Gun-Free School Zones Act, which prohibited the possession of a gun within 1,000 feet of a school.[281] Through cases such as *Adarand* and *Lopez*, the Court has redefined its role in the political arena, while limiting the role of Congress.

C. *The Future of Past Precedent*

The Court's view of stare decisis in *Adarand* will also have an impact on the lower court's treatment of precedent. The decision seems to advise the lower courts to look to the ideologies of the Supreme Court Justices to determine whether or not they should follow precedent.[282] This is not desirable. Moreover, it may lead to inconsistent results. In addition, the lower courts may become "less mindful" in following recent five-to-four decisions since there is the increased awareness that those decisions are more susceptible to reversal.[283]

V. CONCLUSION

The *Adarand* case is clearly the armageddon of affirmative action. The Supreme Court's application of strict scrutiny to federally enacted affirmative action programs has resulted in the death of affirmative action as we know it. Although some remnants of affirmative action may remain, ultimately, the Court's decision will be detrimental to the minorities that the Court once strived to protect.

Other constitutional concepts have not come out of the battle unscathed. The *Adarand* decision has altered the traditional standards of review by introducing a fourth tier to the framework: a new, permissive version of strict scrutiny. As well, the decision has given new life to the Court's role in the political arena, while simultaneously dis-

279. Converse Constr. Co., Inc. v. Massachusetts Bay Transp. Auth., 899 F. Supp. 753, 766 (1995) (citation omitted).

280. 115 S. Ct. 1624 (1995).

281. *Id.* at 1634.

282. Padden, *supra* note 104, at 1714.

283. *Id.* at 1713.

mantling the role of Congress. The doctrine of stare decisis has also suffered critical injury in that the courts will now more easily abandon than adhere to the doctrine.

Ironically, in the wake of *Adarand*, that which has been detrimental to minorities still remains intact: the effects of racial discrimination. *Adarand* demonstrates that in order to combat racism "we must first take account of race. There is no other way."[284]

Margaret A. Sewell

284. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).